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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 62

AMERICAN HIDE AND LEATHER CO., PETITIONER,

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinions of the Court of Claims (R. 27, 29) are reported in 48 F. (2d) 430, 434.

JURISDICTION

The judgment of the Court of Claims was entered on November 3, 1930. (R. 29.) A motion for a new trial was overruled April 6, 1931. (R. 29.) The petition for writ of certiorari was filed April 29, 1931, and certiorari was granted October 12, 1931. (R. 33.) The jurisdiction of this Court

is based upon Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

When a taxpayer makes a payment of taxes, which is intended to and does represent, and which the government so accepts and stipulates did represent, a tax upon the income of a specified twelve months' period, can such payment be subsequently treated as having been made for another and different period, embracing other and different income?

STATUTES INVOLVED

The statutes involved are set forth in Appendix A, infra pp. 20, 21, 22.

STATEMENT

The petitioner filed returns of its income for the calendar years 1918, 1919 and 1920. The return of income for the calendar year 1918 was filed on July 15, 1919, and a tax of $1,246,271.24 on this income was paid during the year 1919. (R. 21.)

The return of income for the calendar year 1919 was filed on May 15, 1920, and a tax of $1,113,509.41 on this income was paid during the year 1920, the final payment being made on December 24, 1920. (R. 21.)

The return of income for the calendar year 1920 was filed on May 12, 1921, showing a net loss of $7,982,322.34, and no tax due. (R. 21.)

The petitioner's books of account, however, were kept upon the accrual basis of a fiscal year ending June 30, and its tax returns were made on an accrual basis. (R. 27.) The provisions of the Revenue Act of 1918, enacted February 24, 1919, required the petitioner to make its tax returns upon the basis of its annual accounting period—a fiscal year ending June 30. The petitioner, having properly filed its returns for the year 1917 on a calendar year basis (R. 22), its fiscal year 1918 was accordingly from January 1, 1918, to June 30, 1918, and its succeeding fiscal years were July 1, 1918, to June 30, 1919, and July 1, 1919, to June 30, 1920. In 1926, at the direction of the Commissioner of Internal Revenue (R. 15, 17), the petitioner filed the tax returns required by law of its income for the fiscal year ended June 30, 1919, and for the fiscal year ended June 30, 1920. (R. 24.) The latter return showed a net loss for the fiscal year July 1, 1919, to June 30, 1920, in the sum of $1,739,036.96. On January 6, 1927, nearly eight years after petitioner had filed a return of income for the calendar year 1918, the Commissioner advised the petitioner by letter that since no return had been filed for the fiscal year 1918, he requested the petitioner to file a fiscal return for that year. (R. 18.)

In accordance with this request of the Commissioner, petitioner, on February 1, 1927, filed its return for the fiscal period 1918, (January 1, 1918, to June 30, 1918) (R. 25), as required by Section 226 of the Revenue Act of 1918.

The Commissioner, after receiving the above mentioned fiscal year returns, adjusted the income of the calendar years 1918, 1919 and 1920 to their respective fiscal year periods, but refused to adjust the tax payments thereon in like manner.

The tax payments as made by the petitioner were adjusted by the Commissioner in the following manner: He treated the payments made on income returned for a calendar year as though they were payments made on a return of income for a fiscal year ending within the calendar year. Thus the payment on income for the calendar year 1918 was treated as though it was a payment on the income for the fiscal period January 1, 1918, to June 30, 1918, although it covered the additional period of income from July 1, 1918, to December 31, 1918, which period was in the next fiscal year. Thus the entire amount of $1,246,271.44, accepted by the Commissioner as a payment on income for the specific period, January 1, 1918, to December 31, 1918, was treated as though it were a payment for the period, January 1, 1918, to June 30, 1918, even though the tax liability determined by the Commissioner for the latter period was only $708,-068.47. The resulting difference, under the Commissioner's adjustment, was treated as an overpayment for the period, January 1 to June 30, 1918, instead of being treated as an accrued payment on accrued income for the period, July 1 to December 31, 1918.

Likewise, the $1,113,504.41 accepted by the Commissioner as a payment on income returned

for the calendar year 1919 was subsequently treated as though it were a payment on income for the fiscal year July 1, 1918, to June 30, 1919, even though the tax liability determined by the Commissioner was only $896,314.83. The Commissioner, by his adjustment, treated the difference as though it were an overpayment for the period, July 1, 1918, to June 30, 1919, instead of treating it as an accrued payment on accrued income for the period, July 1, 1919, to December 31, 1919.

By the above method the Commissioner has eliminated from the fiscal year 1920 all the tax paid on the income of the six months, July 1 to December 31, 1919, which six months' period is part of the fiscal year, July 1, 1919, to June 30, 1920. If the tax paid upon the income returned for the said six months is adjusted to the fiscal year 1920 in the same manner as the income has been adjusted, it will result in a refund to the petitioner for the fiscal year 1920, there being no tax liability for that year.

The petitioner computes a refund due for the fiscal year 1920 of $556,754.72, by allocating to this period one-half of the payment previously made on the income of the calendar year 1919.

Claim for refund of taxes paid on income for the period January 1, 1919, to December 31, 1919, was filed by petitioner on September 10, 1924. (R. 23.)

Claim for refund of taxes paid on income for the period July 1, 1919, to June 30, 1920, was filed by petitioner on September 15, 1925. (R. 23.)

The respondent's interests were at all times protected by waivers filed by the petitioner, beginning with a waiver for the year 1919, filed September 25, 1924. (R. 23.)

The Commissioner rejected petitioner's claims for refund and refused to refund any of the tax paid on income which accrued during the fiscal year 1920. This suit was brought in the Court of Claims on July 16, 1928. (R. 10.)

SPECIFICATIONS OF ERROR TO BE URGED

(1) The Court of Claims erred in holding that a payment made on a return of income for a calendar year must be treated as a payment on a return of income for a fiscal year.

(2) The Court of Claims erred in not giving judgment for the petitioner.

SUMMARY OF ARGUMENT

When a taxpayer pays taxes upon the income for a calendar year, the Commissioner of Internal Revenue is not warranted in subsequently treating the entire amount of such tax as having been paid for a fiscal year.

It is respectfully submitted that when the Commissioner of Internal Revenue adjusts the income accrued during the calendar year to the respective fiscal years contained therein, he must also adjust the tax accrued and paid upon income for the calendar year to the respective fiscal years during which the income accrued.

When the tax paid for the calendar year exceeds the tax liability for the fiscal year, the excess amount cannot be treated as having been overpaid for the fiscal year, but must be allocated to the period which contains the income upon which it accrued.

The contention that, because petitioner's calendar year returns must be treated as statutory returns for the fiscal years, petitioner's payments for the calendar years must be treated as payments for the fiscal years, is contrary to the provisions of Sections 212 (b) and 239 of the Revenue Act of 1918. Taxes are levied upon income, not upon returns. It is further respectfully submitted that even if the calendar year returns filed by petitioner must be treated as returns for the fiscal years, nevertheless, the Commissioner of Internal Revenue was not authorized to disregard the intention of the petitioner that its tax payments were made on specific income accrued during specified twelve months' periods, January 1 to December 31.

Proper claim for refund was filed within the meaning of Section 284 (h) of the Revenue Act of 1926 and within the rule laid down by this Court in *Burnet v. Willingham Loan and Trust Company*, 284 U. S. 437.

ARGUMENT

It is established that the petitioner overpaid its taxes. In a Memorandum to this Court the re-

spondent states "The record in this case discloses that the United States has been overpaid a substantial sum of money for taxes." The question before this Court is the determination of the period for which these taxes were overpaid.

In the Memorandum above referred to the respondent states "The method of allocation adopted by the Commissioner, and approved by the Court below, cannot be said to be entirely free from doubt" and "The situation is one which apparently was not contemplated and for which no provision is made by statute or regulation."

The issue, then, lies between the method adopted by the Commissioner of Internal Revenue and that contended for by this petitioner. The petitioner's method is to allocate to each proper fiscal year so much of the tax payments as were made on the income of each calendar year—thus a tax payment made for the calendar year from January 1 to December 31, 1919, which calendar year embraces six months of the fiscal year 1919 and six months of the fiscal year 1920, would be allocated one-half to the fiscal year 1919 and one-half to the fiscal year 1920. Using the same illustration, the theory adopted by the Commissioner of Internal Revenue holds that all the tax paid on the income of the calendar year 1919 should be deemed to have been paid on income for the fiscal year 1919, ending June 30, 1919.

The petitioner bases its contention that its method is the correct one, in the absence of specific direction in the Revenue Act, upon general

principles of law and upon the fact that it does not violate any of the provisions of the Revenue Act, while those provisions must of necessity be violated in order that the theory of the Commissioner of Internal Revenue and of the Court below may be maintained.

The petitioner, by its payment of taxes on income returned for the period January 1, 1919, to December 31, 1919, specifically applied such payment to the satisfaction of the taxes on the income for that specific period. Any adjustment of this payment by the Commissioner must be made on the basis upon which the tax was paid and received. The Collector was not warranted in originally accepting this payment of taxes on income accrued from January 1, 1919, to December 31, 1919, treating it as such until 1926 and then applying it as though it were a payment of taxes on income from July 1, 1918, to June 30, 1919, contrary to the petitioner's intention, when the respondent's rights are in no way prejudiced.

It is the petitioner's contention that taxes accrue upon and are inseparable from income, which position is supported by the decision of this Court in *Fawcus Machine Company v. United States*, 282 U. S. 375, wherein this Court held that:

> "A corporation cannot claim to have accumulated any net income in any year until provision is made for taxes accrued based on net income for the same year."

See also *Burnet v. Sanford & Brooks*, 282 U. S. 359; *Aluminum Castings Company v. Routzahn*, 282 U. S. 92; *United States v. Anderson*, 269 U. S. 422, and *Lynch v. Turrish*, 247 U. S. 241.

It is apparent that the income of this taxpayer for the calendar years 1918, 1919 and 1920 accrued during the twelve months' periods from January 1 to December 31, 1918, 1919 and 1920, respectively. The petitioner paid taxes computed upon the basis of the income reflected in and accrued during those periods. Therefore, when it was later determined by the Commissioner of Internal Revenue that the taxpayer, having kept its books upon an annual accounting basis of a fiscal year, should have made a return of its income on a fiscal year basis, the income which had already been reported for the calendar year was allocated to the fiscal year periods during which it accrued. To return to the illustration set forth above, the income accrued from January 1, 1919, to June 30, 1919, was held to have been income for the fiscal year 1919, and the income which accrued from July 1, 1919, to December 31, 1919, was held to have been income for the fiscal year 1920. If the petitioner is correct in its contention that income gives rise to taxes and that without income there can be no tax, then it follows that the taxes accrued and paid for the twelve months' period from January 1, 1919, to December 31, 1919, must be treated in the same manner as the income of that period.

The question of the method of allocating tax

payments involved in this case has arisen in several cases where a taxpayer has made returns upon a calendar year basis when they should have been filed on a fiscal year basis. It was first presented to the Board of Tax Appeals in the case of *Paso Robles Mercantile Co.*, 12 B. T. A. 750, which held at page 754:

> "The statute makes no provision with respect to the method of crediting taxes paid on returns filed on one basis when they should have been filed on another. The regulations of the Treasury Department are silent on the question. The Commissioner for a period used one method and subsequently changed to another. There are no decisions on the question. We are then left to considerations of reason and general principles.
>
> "In our opinion, a tax erroneously determined on a calendar year basis should be credited on the tax shown due on a fiscal year basis in proportion to the months in the respective calendar years making up the fiscal years. By this method eleven-twelfths of the tax shown on the basis of the calendar year 1920, for instance, should be credited to the fiscal year 1921, since eleven-twelfths of the calendar year 1920 is in the fiscal year 1921.
>
> "It is true that the income for a year is determined on an annual basis, but the

Supreme Court has found no difficulty in prorating the earnings of the year in order to determine the amount thereof available for dividends at a particular period within the year. See *Edwards v. Douglas*, 269 U. S. 304; *Mason v. Routzahn*, 275 U. S. 175; 38 Sup. Ct. 50.

"On the same principle we think that taxes might be prorated over the year in order to allocate to the respective periods of any calendar year a proportionate part thereof applicable to those periods when the tax paid on a calendar year basis is to be credited on the tax liability on a fiscal year basis."

The Board's decision in this case was affirmed by the Circuit Court of Appeals in *Paso Robles Mercantile Co.*, 33 Fed. (2d) 653, and certiorari was denied by this Court, 280 U. S. 595. The method of allocation was not presented to this Court on petition for certiorari. However, the Circuit Court of Appeals in its decision approved the method of allocation here contended for. The reasoning of the Circuit Court in reaching its conclusion is in conflict with the decision of the lower Court in the instant case as may be seen from the following extract from the opinion of the Circuit Court at page 654:

"He had no specific return for that period and in determining the amount he computed the tax from the two pertinent calen-

dar year returns. Finding to be due a total of $4,653.66, he credited thereon 11/12 of the tax petitioner had paid on the basis of its return for the calendar year 1918 and 1/12 of the amount paid on a like basis for 1919, and thus determined a net balance of $3,697.10. If the return made on April 14, 1919, for the 1918 calendar year, standing alone, be held effective as a return for that period it would be necessary to decide that the assessment of March 10, 1925, in so far as it related to the 1918 calendar year, was void for want of authority, more than five years having elapsed subsequently to the return. If, upon the other hand, such return be deemed ineffective for any purpose until supplemented by the return for the following calendar year because it covered only eleven months of the taxpayer's fiscal year, then the assessment of March 10, 1925, would be within the five year limitation period, for upon that theory there was no complete return for the fiscal year ending January 31, 1919, until the return for the 1919 calendar year was filed, on March 11, 1920. The Board of Tax Appeals adopted this latter view, and we think correctly."

The method of allocation sought by this petitioner has been the basis for decisions favorable to the Commissioner of Internal Revenue in the cases of *Jonas Cadillac Company v. Commissioner*

of Internal Revenue, 16 B. T. A. 932, affirmed by the Circuit Court of Appeals for the Seventh Circuit, 41 Fed. (2d) 141, and *Paso Robles Mercantile Company v. Commissioner of Internal Revenue, supra.* The Commissioner availed himself of this method in order that he might prevail in those cases, but refused, in the instant case, to admit its correctness.

This method of allocation has also been approved by the Board of Tax Appeals in the cases of *Lowenstein Bros. Garment Co. v. Commissioner*, 13 B.T.A. 48; *Paso Robles Mercantile Co. v. Commissioner*, 18 B.T.A. 415, and *Bradstreet Company of Maine v. Commissioner*, 23 B.T.A. 1093.

In the case of *Paso Robles Mercantile Co.*, 18 B.T.A. 415, a statement that no appeal would be taken by the government was published in Prentice-Hall Service 1930, Vol. 2, page 1839.

The method adopted by the Board of Tax Appeals is simply a measure of the tax by the income earned within each taxable period for which it should have been assessed and paid as contemplated by the Statute. Not having information as to what the actual accruals of income were, the Board adopted a prorata basis. Under a method of this kind the rights of the government are not prejudiced.

Solely by holding that the petitioner's tax payments should be treated as though they were paid for the fiscal years does the Commissioner of Internal Revenue create an overpayment in the fiscal year 1918.

The Court of Claims upheld the Commissioner's ruling that payments made on income for the calendar year must be regarded as though they were made for the fiscal year, upon the theory that petitioner's calendar year returns must be regarded as statutory returns for the fiscal year. We believe that the fundamental error of the Court of Claims is in its treatment of returns as the question of primary importance rather than the adjustment of specific payments on specific income.

It is respectfully submitted that even if the theory of the lower Court as to returns is sound, it is irrelevant to the question presented in the instant case. Taxes are levied and paid, not upon a return, but upon income for the period specified in the return.

However, in view of the fact that the Court below appears to arrive at this conclusion solely upon the basis of its interpretation of the petitioner's calendar year returns, it is respectfully submitted that the calendar year returns filed by the petitioner were not the returns required by statute and could not be treated as statutory returns for the fiscal years in the manner stated by the Court.

This Court held, in the case of *Florsheim Brothers Drygoods Company, Ltd. v. United States*, 230 U. S. 453, that a return—which in that case was a tentative return—which did not comply with Section 239 of the Revenue Act of 1918 was not a statutory return. In that case the return did not comply with Section 239 in that it did not purport

to be a specific statement of the items of income, deductions and credits in compliance with Section 239. (See also *Pilliod Lumber Company v. United States*, 51 Sup. Ct. 297.) In the instant case, no calendar year return filed by the petitioner purported to nor could have contained a specific statement of the items of income, deductions and credits for the fiscal year.

It is apparent that if the petitioner's calendar year returns are not statutory fiscal year returns, the conclusion of the Court of Claims based upon that premise is erroneous. It is further apparent that the 1918 overpayment was not created pursuant to a statutory return and the ruling of the Commissioner is, therefore, contrary to Section 250 (b) of the Revenue Act of 1918. The practical effect of the decision of the lower Court would be to abolish, at least in so far as the circumstances in this case are concerned, the distinction between a calendar and a fiscal year return and to negative the provisions of Sections 212 (b), 239 and 250 (b) of the Revenue Act.

There is a question raised by the respondent in its Memorandum filed with this Court concerning the timeliness of the claim for refund filed by the petitioner on September 15, 1925.

The respondent states that "* * *it may be contended that 'the return' within the meaning of Section 284 (h) is the return which the taxpayer should have made; that is, a return for the fiscal year ended June 30, 1920." The respondent further states "This return was due September

15, 1920, and if this is 'the return', the claim for refund filed September 15, 1925, was filed within the five-year period. *Burnet v. Willingham Loan and Trust Company*, 284 U. S. 437."

It is respectfully submitted that the petitioner is suing for an overpayment of taxes for the fiscal year 1920. Section 284 (h) of the Revenue Act of 1926 provides that a claim for refund must be filed within five years after the return is due. The petitioner's return for the fiscal year 1920 was due on September 15, 1920, and claim for refund was filed September 15, 1925, within the five year period prescribed by statute. See *Burnet v. Willingham Loan and Trust Company, supra.*

The respondent has stated that the petitioner is claiming a refund for the taxable year 1920, although it has at no time paid any tax on any return filed for either the calendar year 1920 or the fiscal year ending June 30, 1920. In so far as the fiscal year 1920 is concerned, the question as to whether or not the petitioner paid taxes for that year is the issue before this Court. It is submitted that six-twelfths of the tax paid for the calendar year 1919 was paid on income accrued during the fiscal year 1920 and was therefore a payment of taxes for the fiscal year 1920. In view of the fact that no tax was found to be due for the fiscal year 1920, the amount already paid should be refunded.

The Commissioner of Internal Revenue arrived at an overpayment for the fiscal period ended June 30, 1918, in the sum of $443,367.61—certain refunds having been made—based upon his compu-

tation of a tax liability for that period of $708,068.47 and a tax paid for the calendar year 1918 of $1,246,271.24. However, since this computation was made, the method used by the Commissioner to compute the tax liability has been abandoned by the Bureau of Internal Revenue, which has now adopted a principle of computation in accordance with Section 226 of the Revenue Act of 1918, as enunciated by the Board of Tax Appeals in the case of *Henry D. Weed*, 2 B. T. A. 85, in which the Commissioner has announced his acquiescence in V-1-C.B. 6. The same principle was reaffirmed in the cases of *W. B. Thompson*, 5 B. T. A. 193, *Acq.* VI-1-C.B. 6, and *Coghlin Electric Company*, 3 B. T. A. 1071, *Acq.* VI-1-C.B. 2. A computation of the tax liability in accordance with this principle would fix the true tax liability for the fiscal year 1918 at $554,415.86, and the overpayment, after deducting refunds made, at $597,020.22. This overpayment of $597,020.22 of taxes is an overpayment as of the fiscal year 1920 if petitioner's contention is sustained as to adjustment of tax payments. In other words, if the total payments of $2,339,780.65 were treated as a suspended account from which taxpayer's only obligations to the government were satisfied for the fiscal year 1918 in the sum of $554,415.86 and for the fiscal year 1919 in the sum of $896,314.83, the net balance of overpayment of taxes—certain refunds having been made—is in the sum of $597,020.22.

The above is set forth in order that, in the event the Court finds for the petitioner, it may be determined whether the judgment should be in the sum of $443,367.61 as originally computed by the Commissioner, or in the sum of $597,020.22 in accordance with the *Weed case, supra*, or in the sum of $556,754.72 in accordance with the method of allocation approved by the Board of Tax Appeals in *Paso Robles Mercantile Co. v. Commissioner of Internal Revenue*, 12 B. T. A. 750.

The effort of the petitioner now is, and at all times has been, to recover back an overpayment of taxes admittedly made, but withheld by a method of allocation contrary to law.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Claims should be reversed.

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November, 1931.

APPENDIX A

STATUTES INVOLVED

The Revenue Act of 1918, c. 18, 40 Stat. 1057, provides in part:

"SEC. 200. That when used in this title—

The term 'taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under Section 212 or Section 232. The term 'fiscal year' means an accounting period of twelve months ending on the last day of any month other than December. * * *"

"SEC. 212 (b). The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * *. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. * * *"

"SEC. 226. That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall

be made for the period between the close of the last fiscal year for which return was made and the following December 31. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. * * *

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; * * *."

"SEC. 230 (a). That, * * * there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates; * * *."

"SEC. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a return stating specifically the items of its gross income and the deductions and credits allowed by this title. * * *.

Returns made under this section shall be subject to the provisions of sections 226 and 228. When return is made under section 226 the credit provided in subdivision (c) of section 236 shall be reduced to an amount which bears the same ratio to the full credit

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therein provided as the number of months in the period for which such return is made bears to twelve months."

"SEC. 250 (b). As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252. * * *."

The Revenue Act of 1926, c. 27, 44 Stat. 9, provides in part:

"SEC. 284 (h). Except as provided in subdivision (d) this section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due."

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paid the tax shown by these returns. Since the petitioner's books were kept on the basis of a fiscal year ending June 30th, its returns should have been made upon the basis of its fiscal year. On these facts two questions arise:

1. Whether, in adjusting the taxes upon the fiscal year basis, the Commissioner should allocate any part of the payments of taxes originally assessed and paid for the calendar year 1919 to the fiscal year 1920.

2. Whether the petitioner's claim for refund filed September 15, 1925, was too late to support recovery of any part of such tax payments if they should have been allocated to the fiscal year ending in 1920.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*, pp. 11–13.

STATEMENT

The petitioner filed returns for the years 1918, 1919, and 1920 upon the calendar year basis. The return for the calendar year 1918 was filed on July 15, 1919, and the tax disclosed by this return was paid during the year 1919. (R. 21.) The return for the calendar year 1919 was filed on May 15, 1920, and the tax disclosed by this return was paid during the year 1920, the final payment being made on December 24, 1920. (R. 21.) The return for the calendar year 1920 was filed on May 12, 1921. (R. 21.) This return showed no net income and no tax. (R. 21.)

The petitioner's books of account were kept upon the basis of a fiscal year ending June 30 (R. 27), and accordingly under the provisions of Section 212 (b) of the Revenue Act of 1918 (*infra*, pp. 11–12) its returns should have been made upon the basis of its fiscal year. In 1926 the petitioner filed amended returns for the fiscal year ended June 30, 1919, and for the fiscal year ended June 30, 1920 (R. 24), together with claims for refund based thereon (R. 25). The latter return indicated a net loss for the fiscal period. The petitioner computed a refund due of $556,754.72 by allocating to this period one-half of the payment previously made for the calendar year 1919.

The Commissioner of Internal Revenue refused to adopt the allocation of payments made by the petitioner and adjusted the payments to the tax disclosed as due on the amended fiscal year returns in the following manner: He treated the calendar year returns as returns for the taxable year ending within the calendar year for which the return was made. Thus the return for the calendar year 1918 was treated as a return for the fiscal period January 1, 1918, to June 30, 1918, although it covered the additional period from July 1, 1918, to December 31, 1918. The tax paid on the 1918 calendar year return was treated as a payment of the tax due for the fiscal period ended June 30, 1918. This resulted in a considerable overpayment for the fiscal period ended June 30, 1918. $94,835.16 of this sum had been paid

in 1924 within the statutory period for filing claims for refund, and this amount, with interest, was refunded to the petitioner; the balance of $443,367.61 was held to be barred from refund. (R. 26.) The Commissioner then allocated the payments made on the 1919 calendar year return to the tax due for the fiscal year ended June 30, 1919. This resulted in an overpayment of the tax for the fiscal year 1919, which was refunded to the petitioner. Since no tax had been paid on the calendar year 1920 return and no tax was disclosed as due on the return for the fiscal year 1920, no adjustment was made for this period. The adjustments made by the Commissioner are summarized in the footnote.[1]

The petitioner contended that the payments which it had made on the calendar-year basis should be applied to the fiscal-year tax by allocating the calendar-year payments according to the number of months of the fiscal year contained in the calendar year. Thus, the petitioner contended that the payment for the calendar year 1918 should be allocated one-half to the fiscal year ending June 30, 1918, and one-half to the fiscal year commencing

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[1] Fiscal period January 1, 1918, to June 30, 1918:

Total tax assessable	$708,068.47
Tax previously assessed (calendar year 1918)	1,246,271.24
Overassessment	538,202.77
Fiscal year ending June 30, 1919:	
Total tax assessable	896,314.83
Tax previously assessed (calendar year 1919)	1,187,444.67
Overassessment	291,129.84
Fiscal year ending June 30, 1920:	
Total tax assessable	None.
Tax previously assessed (calendar year 1920)	None.

July 1, 1918. In the same manner, it contended that the tax paid for the calendar year 1919 should be allocated one-half to the fiscal year ending June 30, 1919, and one-half to the fiscal year commencing July 1, 1919. Since the return filed for the latter fiscal year disclosed no tax due, the petitioner sought to have refunded to it one-half the tax paid for the calendar year 1919, which it contended should be treated as a payment for the fiscal year commencing July 1, 1919.

The petitioner's claim for refund filed on this ground was rejected August 10, 1927.[2] (R. 25.) This suit was brought in the Court of Claims on July 16, 1928, to recover the amount sought in the claim for refund for the period ending June 30, 1920.

DISCUSSION

I

This case presents a problem which has arisen in several cases where a taxpayer has made its re-

[2] In its petition in the Court of Claims the petitioner did not allege the filing of a claim for refund on September 15, 1925. Instead, it alleged the filing of a claim for refund on January 22, 1926. (R. 13.) But in its findings the Court of Claims included a finding that a claim for refund was filed September 15, 1925. (R. 23.) Although the findings do not show that the present ground was asserted in that claim for refund an examination of the record in the court below discloses that the claim for refund was filed and that in it the petitioner did rely upon the ground on which it now seeks recovery. Under these circumstances the Government is not disposed to rely upon the fact that the petitioner failed to allege the filing of this claim for refund in its petition in the Court of Claims.